

DOCKET NO. 572504

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| TEXAS ALCOHOLIC BEVERAGE | § | BEFORE THE TEXAS |
| COMMISSION | § | |
| | § | |
| VS. | § | |
| | § | |
| LIZARD'S BILLIARDS L.P. | § | |
| D/B/A LIZARD'S BILLIARDS | § | ALCOHOLIC |
| PERMIT/LICENSE NO(s). MB542337 | § | |
| PE | § | |
| | § | |
| WALKER COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-08-3100) | § | BEVERAGE COMMISSION |

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 7th day of November 2008, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Carrie L. McLarty. The hearing convened on June 27, 2008 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 4, 2008. This Proposal for Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

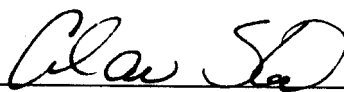
The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's permits are herein **SUSPENDED for ten (10) days beginning at 12:01 A.M., on the 17th day of December 2008.**

This Order will become final and enforceable on December 4, 2008 unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below

SIGNED this the 7th day of November
2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE TO (713) 812-1001

Lizard's Billiards L.P.
d/b/a Lizard's Billiards
RESPONDENT
2 Magnolia Dr.
Huntsville, TX 77340
VIA U.S. FIRST CLASS MAIL

Lizard's Billiards L.P.
c/o Lisa Jump, Representative
1231 Josey Street
Huntsville, TX 77340
VIA U.S. FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

SKP/aa

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

September 4, 2008

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

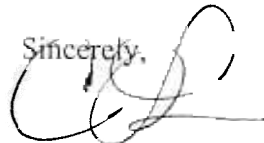
**RE: Docket No. 458-08-3100; Texas Alcoholic Beverage Commission v. Lizard's
Billiards L.P. D/B/A Lizard's Billiards**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,



Carrie L. McLarty
Administrative Law Judge

CLM/jh
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra K. Patton, Attorney, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, Texas 77008-**VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-**VIA REGULAR MAIL**
Lizard's Billiards L.P. d/b/a Lizard's Billiards, 1231 Josey Street, Huntsville, Texas 77340-**VIA REGULAR MAIL**
Lizard's Billiards L.P. d/b/a Lizard's Billiards, 2 Magnolia Drive, Huntsville, Texas 77340-**VIA REGULAR MAIL**

SOAH DOCKET NO. 458-08-3100

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**

Petitioner

VS.

**LIZARD'S BILLIARDS L. P.
D/B/A LIZARD'S BILLIARDS,**

Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Petitioner) seeks to suspend the permit and license of Lizard's Billiards L. P. d/b/a Lizard's Billiards (Respondent) for ten days, alleging that Respondent permitted the consumption of alcoholic beverages during prohibited hours. The Administrative Law Judge (ALJ) recommends the suspension be imposed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing in this case was held on June 27, 2008, in Houston, Texas, before Rex Shaver, ALJ. ALJ Carrie L. McLarty reviewed the record in this case and issues this Proposal for Decision. Petitioner appeared through Sandra Patton, staff attorney. Respondent appeared through Representative Lisa Jump.

There are no disputed issues of notice in this proceeding. Therefore, matters relating to notice are set out in the proposed findings of fact and conclusions of law without further discussion here.

Petitioner has jurisdiction over the subject matter of this appeal pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71 and 61.73. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including issuing this Proposal for Decision with

proposed findings of fact and proposed conclusions of law, pursuant to TEX. GOV'T CODE ANN. § 2003.021.

II. REASONS FOR DECISION

A. Legal Standards

TEX. ALCO. BEV. CODE ANN. § 61(b)(2) provides that, Petitioner may suspend or cancel a permit for violation of a provision of the Code or of Petitioner's rules. Pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(18), Petitioner may suspend or cancel a retail dealer's license for permitting the consumption of alcoholic beverages on the licensed premises at a time when the consumption of alcoholic beverages is prohibited. TEX. ALCO. BEV. CODE ANN. § 105.06(b) states that a person commits an offense if he consumes, or possesses with intent to consume, an alcoholic beverage in after 12:15 a.m.

B. Evidence

Petitioner has the burden of proof in this case. It alleges that on Tuesday, January 1, 2008, at 12:45 a.m., Respondent's bartender Adam Fanning, was on the licensed premises after closing hours at a time when the consumption of alcoholic beverages was prohibited. Two of Petitioner's agents entered the licensed premises and observed Mr. Fanning talking with a patron, Justin Rountree. Mr. Rountree was drinking a dark brown liquid out of a transparent plastic cup. Mr. Rountree reported he was drinking bourbon. Respondent acknowledges the event occurred, but claims the violation was inadvertent because the Mr. Fanning did not realize Mr. Rountree was drinking anything other than cola.

Petitioner presented testimony from two of its agents, as well as its records of Respondent's violation history. Respondent presented testimony from Mr. Fanning and from Ed DeLaGarza, the owner of the building in which Respondent's business is located.

Dustin Shrell

Agent Shrell is employed by Petitioner as an enforcement agent. He testified he and Agent Zella arrived at Respondent's premises in Huntsville, Texas, at 12:45 a.m. on January 1, 2008. At that time, he looked through the window and observed two people speaking with each other in the premises, one of whom was drinking some type of liquid. Agent Shrell then entered the premises and approached the men. One was identified as the bartender, Mr. Fanning, and the other was a patron, Mr. Rountree. Mr. Rountree was drinking a dark brown beverage out of a transparent plastic cup. Agent Shrell asked Mr. Rountree what he was drinking, and Mr. Rountree advised he was drinking bourbon. Agent Shrell examined the cup's contents and confirmed it to be a distilled spirit and some type of cola. Agent Shrell asked Agent Zella to interview Mr. Fanning, while Agent Shrell continued to interview Mr. Rountree. Agent Shrell testified he believed Mr. Rountree was intoxicated because Mr. Rountree used the bar for support, had slurred speech, and swayed when he walked away from the bar. Agent Shrell issued citations for Mr. Rountree for public intoxication and for consuming alcoholic beverages during prohibited hours.

2. Scott Zella

Agent Zella is employed by Respondent as an enforcement agent. He testified that on January , 2008, he and Agent Shrell went to Respondent's business at 12:45 a.m., and saw two people through the window, one of whom was drinking. The agents entered the premises and Agent Shrell asked Agent Zella to interview the bartender, Mr. Fanning. Mr. Fanning told Agent Zella he had "no comment" other than to provide identification and to state he had completed the TABC course. Agent Zella issued an administrative notice to Respondent for allowing the consumption of alcoholic beverages on the premises during prohibited hours.

3. Adam Fanning

Mr. Fanning testified he is employed by Respondent as a bartender. On January 1, 2008, he stated he was closing the bar down and Mr. Rountree was still present. Mr. Fanning stated he thought Mr. Rountree was drinking cola and only realized Mr. Rountree was actually drinking an alcoholic beverage right before Petitioner's agents entered the premises.

4. Ed DeLaGarza

Mr. DeLaGarza owns the building in which Respondent's business is located. He testified that he went upstairs to his office around 12:10 a.m., and saw Mr. Fanning and Mr. Rountree in the bar. He stated he left approximately 12:30 or 12:35 and never saw anyone consuming any beverages.

5. Respondent's Permit History

Respondent holds a Mixed Beverage Regular Hours Permit No. MB542337, issued by Petitioner. According to the permit history, Respondent received a penalty of \$1,050 in September, 2005, for allowing a minor to possess or consume an alcoholic beverage.

C. Analysis

Petitioner contends it is entitled to suspend Respondent's permit/license for ten days because Respondent's bartender, Mr. Fanning, allowed consumption of beer by Mr. Rountree after 12:15 a.m., after which time all consumption of alcoholic beverages was prohibited. Respondent concedes that this event occurred, but argues that the offense was inadvertent because Mr. Fanning was unaware Mr. Rountree was drinking anything other than cola.

IV. PROPOSED CONCLUSIONS OF LAW

- Petitioner has jurisdiction over this case pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61
- 2 The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
 - 3 Respondent was properly notified of the hearing as required by 1 TEX. ADMIN. CODE (TAC) §155.55 and TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
 4. Based on Finding of Fact Nos. 3 and 4, Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(18).
 - 5 Based on Conclusion of Law No. 4, suspension of Respondent's permit and license for the proposed ten-day period is warranted.
 6. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64(a), the proposed suspension is warranted, and Respondent should not be allowed to pay a civil penalty in lieu of suspension.

SIGNED September 4, 2008.



CARRIE L. MCLARTY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS